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THE COMPETENCY OF A WITNESS TO THE EXECUTION OF A WILL WHICH NAMES HIM EXECUTOR.

In the recent case of *Jones v. Grierer* (Illinois), 87, N. E. 295, the oft mooted question as to the competency of a witness to the execution of the will wherein he is named executor again arose. In this case one Jeremiah Smith died, owning both real and personal estate. He left a will by which he gave, absolutely, his personal property to his sister, Matilda Jones, appellee, and gave her, also, the use of his real estate during her natural life. To her son he devised the fee. The executors, two in number, were also the attesting witnesses to the will. The County Court held the attesting witnesses, by reason of the fact that they were executors, incompetent, and refused to admit the will to probate. On an appeal to the Circuit Court the witnesses were held to be competent, and the will was admitted to probate. Hence the prosecution of this appeal. The Supreme Court of Illinois decided that the subscribing witnesses, named in the will as executors, were not competent, *per se,* to establish the will, but that they were rendered competent by Section 8 of the Mills Act, *Hurd's Stat.,* Ill., 1908 p. 2193.

By the common law, it is not essential to the validity of a will that it should be attested by the witnesses. *In Re High, 2 Doug.,* (Mich.) 515. Although at one time in England the meaning of the term "credible" as applied to witnesses was the subject of some difference of opinion it is now well settled, in this country at least, that the word "credible" witness means competent witness. So in construing our various Mill's Acts,

wherein the term "credible" witness is generally used, we may substitute the term competent witness. As a general rule, all persons are competent witnesses to a will unless expressly excluded. The rule of the common law has been held to be the standard by which the competency of attesting witnesses is to be determined. *Hitchcock v. Shaw,* 160 Mass., 140. Witnesses are deputed by law to protect the testator from any fraud, imposition, coercion or restraint, and to confirm his last will and testament as his voluntary and rational act. It is only natural then, that the rule has been enforced that unless a witness at the time of execution did not possess the qualities required, they cannot subsequently be supplied. At common law there was some conflict of authority as to whether the requisite competency in the attesting witness must exist at the time of attestation, or when the will was offered for proof. 1 *W. Bl.,* 366. Yet, it has never been doubted that subsequent incompetency will not impair the validity of the attestation. *Brograve v. Winder, 2 Ves., Jr.,* 636. *In re Holt,* 56 Minn. 33. By the Roman law wills were required to be executed in the presence of both freemen and citizens. If, when the will was executed, the witnesses did not have these qualifications, subsequent emancipation or grant of citizenship could not supply it. It is right at this point, of competency at the time of execution, that commence the divergence of the holdings of our various American courts; some of our states holding that the commission to the executor constitute such an interest as avoids the will, to which he is a necessary witness, but the majority are emphatically opposed to such an idea.

On the one side it is urged that the commissions are neither a devise nor a bequest, and hence that the executors are not relieved from incompetency by statutory provisions declaring incompetent such witnesses. At the common law executors were not entitled to any compensation for their time and trouble. So long ago as Lord Hale's time it was settled that an executor who had no interest in the surplus was a good witness to prove the will. 1 *Mod.* 107; *Bettison v. Bromley,* 12 *East,* 250. But as the English law did not allow compensation, we need not look to their decisions for direct authority upon the Question of Consideration.

In *Comstock v. Hadlyme Ecc't Soc.,* Conn. 254, although the point of compensation to an executor acting as attesting witness to the will, wherein his office had been created, was directly relied upon as a reason to exclude the probating of the will, yet the court held the executor competent, although "he was entitled to payment of his expense and compensation for his services." *lb.* 263.

In Kentucky, where by statute the executor is allowed compensation for his services, the court said, "An executor who has no interest in the residuary fund, and no other interest than that of a fiduciary, is a competent witness to prove the will, whereby his appointment is initiated." *In the will of McDaniel, 2 J. J. Marsh,* 332.

In the case of John Randolph of Virginia, a question as to the competency of one of the executors arose, and the court held that, "An executor, in his transactions as such with the world, is the representative

and legal owner of his testator's estate, responsible for its due administration, identified with its interests, and bound to assert and defend them. He cannot be a witness for himself in controversies with strangers affecting the interests thus vested in him. Nor when he is called to account as trustee by his *cestuis que trust* can he testify against them in relation to the measure or extent of his responsibility. But what good objection can there be to his competency amongst the *cestuis que trust* themselves, or between two classes of person,, each claiming the interests rightfully belonging to *cestuis que trusts?* The estate which the executor represents is in no wise interested in such a contest. Nor has he himself any personal interest in it. As to his losing the office of executor, by a vacation of the will, it is no loss in the eye of the law, which regards it, not as a lucrative employment, but as an onerous engagement, accepted from different considerations than pecuniary emolument. His commissions are designed merely to reimburse him for his labor and expenses; and if he should lose them prospectively he will be at the same time relieved from the services and responsibilities for which they are allowable." *Coalter's Exec'rs, et al., v. Byron and wife et al. I. Grat.* 87, 89.

It was held in the New Hampshire court that the compensation allowed to an executor for his services was provided for by statute, and is not a gift under the will, and hence that he is a competent subscribing witness. *Stewart v. Harriman,* 50 N. H., 25. Mississippi in the case of *Rucker v. Lambdin,* 20 Miss. 230; *Sand M.* 12, holds that a subscribing witness to a will is not incompetent to testify in support of it, by the fact that he is named in the will as executor. The Missouri courts in *Murphy v. Murphy,* 24 Mo. 526; as do the Pennsylvania courts in *Snyder v. Bull,* 17 Pa. 54, hold the same. Instances of this doctrine in a majority of the states can be greatly multiplied.

The reason for the exclusion of a legatee or executor as a witness to a will, is on the ground of interest alone. But to make one an executor, there is something necessary beyond the mere appointment in the will. He must assume the duties. If he refuses to qualify and the refusal be entered of record and administration be granted, he is not, and he cannot be executor. *Williams on Ex'rs.,* 153, 155. If he refuse, then he has never had any interest, for a man cannot be made executor against his will. Hence it is that we find so many decisions based either upon statute or judiciary reasoning, allowing the competency of a witness after he has renounced his executorship. So, too, the credibility of attesting witnesses must be judged as of the period of attestation. This is so held, that an avoidance of the will cannot be brought about. A subsequent disability of a witness will not prevent the will being proved and allowed. What definite interest is there to the executor in the will of a testator? No living man has an executor. The will is certainly ambulatory until the death of the maker. Even then the executorship is not absolute. The executor may not accept, and should be then a good witness. Though he might eventually be a good executor, still he might not be. He might die in the lifetime of the (to be) testator; or his nomination might be revoked, or he might not find it convenient to accept. Although he may

have in view the executorship, yet a contingent interest does not disqualify a witness at the time of deposing nor for an equal reason; at the time of attestation. Had there been a renunciation, the witness might have been sworn, yet his renunciation would not have been a release of an intermediate interest.

In contemplation of law, an executorship is not an office of profit. The design of the allowance to the executor in this country is compensation, in England the services are gratuitous. It is sometimes more and seldom less, but by supposition the executor gets only what he has earned. In case his returns are too large, it is the fault of the court and not of the law. "Unlike a legatee, he is not the testator's beneficiary. Though the bare appointment of an executor constitutes a testacy, yet since his contingent right to the surplus was taken away, the office has been a naked trust." *Snyder v. Bull, supra.* For, if an executor had anything beyond a mere naked office under the will, then upon his death, before services rendered, his representatives would be entitled to it. Then, it must follow, that it is not the will but the law of services rendered after the grant, which entitles one to remuneration.

On the other hand in those jurisdictions where an attesting witness is not allowed to be an executor under the same instrument, and the appointment to the office of executor is an appointment to an office yielding emolument, then it must follow that an executor under such a will is an incompetent witness.

It was held in the case of *Taylor v. Taylor, I. Rich.* 531, "that the statute 25 George III, c. 6 was in force in South Carolina but did not extend to personal estate, and that one appointed executor, by his right to commissions, takes an interest by the will, which renders him an incompetent witness." The English courts having held that the statute of George II did not apply the wills of personalty, because they required no attestation. *I. Jarm,* 65; *Emanuel v. Constable,* 3 *Russ.* 436.

In the case of *Tucker v. Tucker,* 5 *Iredell (Law),* 161, the court of North Carolina expressed its regret that the policy of the statute of George II. had not been adopted in that state, and there held "that the executor was not a competent witness upon the trial of an issue *devisavit vel non,* because of his legal right to commissions on the personal estate." From the language employed in both of these cases, it seems only reasonable to assume, that if a similar statute to that of George II. had been in force in those states, the executors would have been admitted as competent witnesses.

In the case of *Allison's Ex'rs. v. Allison,* 4 *Hawks* 141,, it was decided that one who had been appointed a trustee to sell lands under a will, and had also been appointed executor, was not a competent attesting witness. This same rule was adopted, at one time, in New York, although, as said by Judge Harris, "with hesitation." *Burritt v. Sullivan,* 6 *Barb.* 198.

In Pennsylvania, where two executors brought an action, it was held that one of them was not a competent witness, although he offered to make a deposit sufficient to cover all costs, because of his interest in the com-

mission on the estate. *Gebhart v. Gebhart's Ex'rs,* 15 *Serg. and Raw.* 235. *Anderson v. Neff,* 11 *Sand R.* 208, in the same court again adopted that theory. However, see the case of *Snyder v. Bull, supra,* decided twenty-five years later, and which has largely acted as a basis for subsequent decisions.

In *Gass' Heirs v. Gass' Ex'rs,* the Supreme Court of Tennessee held that since the statute 25 George II, was not in force there, that a legatee could not be a good attesting witness. 3 *Humph.* 279.

In the case of *Sears v. Dillingham,* 12 Mass. 358, it was held that the executor was an incompetent witness, because liable to costs. The court proceeds to say, "that by the common law, an executor, who is not a residuary legatee, and has the beneficial interest in the estate may be a witness to prove the execution of the will." "The competency must exist at the time of the attestation: a subsequent incompetency will not affect the formal execution of the will, otherwise the commission of crime, which renders infamous, or the succession to an estate under a devise, would disable a witness who was free from crime or interest at the time of subscribing." "If, then, the executor was a competent witness at the time he attested the will, there can be now no legal obligation to it because of his subsequent incompetency. He appears to derive no interest whatever under the will, not being residuary legatee, nor having any desire or bequest in it."

As late as nineteen hundred and ninety-eight, it was held "that if a will provid a pecuniary benefit to the attesting witness though dependant upon the happening of a contingency, he has a beneficial interest under it; and if the contingency does not happen, that fact does not relate back and restore competency. In *re Trinitarian Congregational Church and Society of Castine,* 91 Me., 416.

So the law stands in the various states. The confusion in the results, and the opposite views on the same set of facts, proving that all of these conclusions cannot rest upon correct principles. Yet, the preponderance of weight makes an executor a competent witness, and most of the cases cited in negation of this principle are of anything but recent date. There is a decided tendency of recent years toward abrogating the doctrine of not allowing an executor to prove the will, and toward substituting, by both judicial decisions and statutory provisions—plainly making such a line of decisions incumbent upon the courts—a rule allowing this right to prove, to one who has been named executor. Some states require relinquishment of the executorship by the person named as executor, before he can become a competent witness. Others do not. That the will shall not be defeated for lack of technical attestation, seems to be a principle becoming more and more firmly carried out by the courts each year. The whole current of English cases are strongly set toward the proposition that the appointment to the office of executor does not disqualify. *Bettison v. Bromley,* 12 *East,* 250. Phipps v. Pitcher, 6 Taunt. 219. It is the interest which the executor takes under the will which has that effect. For, without the statute, the executor would not be entitled to his commission. The

question, then, turns upon the point, when does the beneficial interest of the executor accrue? Because the will confers no pecuniary benefit upon him, he cannot have an interest at the time of attestation. Here is one difference between him and the executor who took the *residuum* at common law. So, too, at the probate of the will the executor has no interest. For what if he renounce the trust, or be not able to give the named security? Until the grant of the letters testamentary there is no interest. Both the attestation and the probate precede this. The right to commissions, so far from taking effect through relation to the time of attestation, has not accrued until the services have been performed, and the allowance is not made until there has been a final settlement of the estate, or the close of the administration. See *Merrill v. Moore's Heirs, 7 How.*, Miss. 293. If in point of fact, the executor does not administer the estate, he is entitled to no compensation, for commissions are allowed upon the whole estate administered. Does it not follow that, that "certain, immediate legal interest" in the witness, at the time of attestation, which is necessary to render him incompetent, is not present?" *See II. Greene, Ev.* 455.

The Illinois court in *Jones v. Grieser, supra,* the case under discussion, is of the opinion that an executor has "such a direct financial interest in the probate of the will that he is disqualified by reason of such interest as a witness to the execution of the will," and "that he has an interest in the probate of the will to the extent of his commissions as executor," and "that the true test of interest of such witness is whether he will gain or lose financially as the direct result of the proceeding," and since commissions are a direct gain the executor is an incompetent witness. However, in the present case, statutes of the state of Illinois removed the objection to the witnesses to the will in question, because these witnesses fell within the purview of the state statutes made to regulate just such conditions. The Illinois court, in view of the previous decisions of that political authority, could not have decided differently than they did, and at the same time carried out the doctrine of *stare decisis* as laid down by former courts of that state. That the view of the Illinois court in holding that "the interest which he (the executor) has, however, like that of a devisee or legatee grows out of and by virtue of the execution of the will," and that "an executor is not a competent witness to the execution of a will which names him executor," is plainly the holding of the minority of the states of this country, and is against the interpretation of the majority, and also the interpretation given to the same proposition by the English courts, cannot be controverted. For in these jurisdictions, the executor has not an office of emolument, but, as Lord Ellenborough has aptly put it, "The executor takes no interest under the will, but only a burthensome trust." *Betteson et al., v. Bromley,* 12 *East.* 250; *Low v. Joliff,* 1 *W. Bl.* 365.

UNFAIR COMPETITION AS APPLIED TO UNPATENTED ARTICLES.

It is well settled that after the expiration of a patent, a person's right to monopolize the manufacture and sale of the patented article ceases.